Supreme Court, U.S.
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NO. 82-5298

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ANDRES SEGURA and LUZ MARINA COLON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONERS

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1. Respondent contends (Br. 14-23) that the officers' entry into petitioners' apartment to secure the premises was not an illegal seizure of all of its contents. In support of this argument, respondent distinguishes between "searches" and "seizures" with respect to the Constitutional requirement of a warrant, and goes so far as to state that seizures, which respondent terms "less intrusive", are generally permitted without a warrant. (Br. 18)

In so arguing, respondent mistakingly relies on *Texas v. Brown*, U.S. , 103 S.Ct. 1535 (1983). *Texas v. Brown, supra*, dealing with the "plain view" exception to the warrant requirement, holds that police officers may immediately seize a suspicious object, without a warrant, if they perceive it while lawfully engaged in an activity in a particular place. An object is in "plain view" if it can be seized without compromising any interest in the personal privacy of a citizen. *Id.* at 1546 (Stevens, J. concurring).

In the instant case, the objects of the seizure were *not* in plain view, but were within a dwelling that the officers unlawfully entered and occupied. The actions of the police violated both the petitioners' interest in retaining possession of property ("seizure") and their interest in maintaining personal privacy ("search"). Since a person has the highest possible expectation of privacy in his home, *Payton v. New York*, 445 U.S. 573 (1980), the illegal entry and nineteen hour occupation constituted an infringement not only of petitioners' right of possession in the dwelling and its contents, but also their right of personal privacy against the probing eyes of the police.

2. Respondent's contention that "police may seize property that they have probable cause to believe contains contraband for the limited period necessary to obtain a search warrant" (Br. 19-20) is inapplicable where the "property"

consists of a dwelling and its contents. The cases cited by respondent involve luggage seizures from automobiles, where, because of the inherent mobility of the vehicle, and the lessened expectation of privacy one has while driving or riding in an automobile, a narrowly defined exception has been made to the rule that the police must obtain a warrant before seizing property. *See, e.g., Chambers v. Maroney*, 399 U.S. 42 (1970).

The interest in the privacy of the contents of a suitcase or a footlocker is little compromised by its seizure by the police in a public place or on a public highway. But when the suitcase is inside a house that the police illegally enter and occupy, no decision by this Court has allowed the seizure of such property pending the obtaining of a search warrant. The privacy interests of petitioners have been violated by the initial entry, and the violation continues for every minute of the illegal occupation.

3. Respondent argues (Br. 21-23) that the degree of seizure of the articles in the dwelling would be the same whether the premises were secured from outside or from within, and that therefore the occupation of the dwelling by the police is irrelevant to the question of whether there was an illegal seizure. This argument ignores the difference between sound, legitimate police activity and the violation of petitioners' Constitutional rights.

Quite simply, the illegal entry and occupation of the dwelling constituted a seizure of the dwelling and the later-discovered contraband, while if instead the police had never entered petitioners' apartment, no unconstitutional seizure of either the dwelling or its contents would have occurred. Indeed, it is often the case in Fourth Amendment jurisprudence that had the governmental officials acted in a lawful manner, the end result would have been the same: the seizure

of contraband or other incriminating evidence. *See, e.g., Johnson v. United States*, 333 U.S. 10 (1948); *McDonald v. United States*, 335 U.S. 451 (1948); *Mincey v. Arizona*, 437 U.S. 385 (1978). The "ends" of all police investigations are the detection and arrest of criminals and the seizure of illegal or incriminating evidence. The "means" utilized by the police are regulated by the Constitution and are always subject to the scrutiny of the judicial system. The ends cannot be allowed by this Court to justify the means; if they are, the protections of the Fourth Amendment will become greatly diminished, and the Warrant Clause will cease to have any meaning at all.

4. Respondent's argument (Br. 23-33) that the evidence seized under the warrant is not suppressible as the fruit of an illegal entry is a viable contention only if this Court decides that the initial illegal entry into and nineteen hour occupation of petitioners' home did not constitute a "seizure" of its contents, including the contraband discovered during the execution of the search warrant. Petitioners contend (Br. of Pet. 22-34) that the contraband seized was primary rather than derivative evidence and that therefore the doctrines of "attenuation" and "independent source" are inapplicable.

A very recent decision by the Oregon Supreme Court considered the question of whether the unlawful seizure and securing of a dwelling required that marijuana discovered during the execution of a warrant obtained two-and-a-half hours after the initial entry should be suppressed. *State v. Hansen*, 295 Or.Rptr 78, 664 P.2d 1095 (Or. 1983). The court rejected the government's reliance on *Wong Sun v. United States*, 371 U.S. 417 (1963), finding that the instant case was concerned with the very evidence the police sought to obtain by "securing" the premises, *i.e.*, "primary evidence", in contrast to *Wong Sun*, where the United States Supreme

Court was concerned with the admissibility of "derivative" evidence.

After refusing to go so far as to hold that a seizure of a residence is a seizure of all its contents, the *Hansen* court sought to determine exactly *what* is seized when a residence is "secured" or "frozen". First, it was held that such items of contraband as were actually discovered by the entering officers or which were clearly visible to the officers should be deemed to be seized. Second, as to contraband not discovered or visible on the officers' initial entry, *Hansen* looked to the purpose of the unlawful conduct. The purpose of the entry and occupation was to arrest and convict the defendant for possession of the primary evidence, the marijuana, and the unlawful entry figured in the accomplishment of that purpose by ensuring that the contraband believed by the police to be present could not, and would not, be removed. "The 'securing' of the premises as effectively reduced the marijuana to the control of the trespassing police as if they had actually discovered and taken physical possession of it. We hold this to be a seizure under both the state and federal constitutions and thereby proscribed as being unreasonable for want of a warrant." *Hansen, supra* at 664 P.2d 1105-6.

Petitioners submit that the holding in *Hansen, supra,* was based on a proper and logical analysis of the law, and urge this Court to follow the reasoning of that case.

5. Respondent asserts that "the fact that their (petitioners') apartment was secured against the entry by them or others . . . did not really affect them, and the delay in getting the warrant did not inconvenience them." (Br. 42) Such an argument undercuts the importance of the Warrant Clause of the Fourth Amendment, which affects us all, and the significant role of a judicial warrant.

The Fourth Amendment has nothing to do with the "convenience" of an individual defendant. It is, like all of the Bill

of Rights, an enunciation of rules of conduct that the government must obey. Its violation affects not only criminals or those thought to be criminals, but the life and liberty of us all. *Spano v. New York*, 360 U.S. 315, 320-321 (1959).

Had a warrant been obtained by the police before their illegal entry and occupation of petitioners' dwelling, such a warrant would have provided the detached scrutiny of a neutral magistrate and would have described the proper bounds once the search had begun. Further, a warrant would have assured petitioners "of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

For the foregoing reasons and the reasons stated in petitioners' opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted,

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